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No. 00-1249

# In the Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD, PETITIONERS

*v.*

CHICAGO PARK DISTRICT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTIONS PRESENTED

A Chicago Park District ordinance requires a person to obtain a permit before conducting "events involving more than fifty individuals" in a municipal park. The ordinance specifies the grounds on which a permit application may be denied, none of which is based on the content of any expression that may be involved in the event. The questions presented are:

1. Whether the ordinance vests the permit-granting authority with too much discretion to satisfy First Amendment standards.

2. Whether, in order to satisfy the First Amendment, the ordinance must ensure that final judicial decision on the merits of an applicant's challenge to the denial of a permit will be rendered within a fixed deadline.

3. Whether, in order to satisfy the First Amendment, the ordinance must require the Park District to initiate a judicial proceeding to give effect to the administrative denial of a permit application, or whether instead it is sufficient that the applicant seek judicial review of the administrative permit denial.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a municipal ordinance that requires individuals to obtain a permit before conducting large-scale events in public parks. Such events may include not only social gatherings and sporting events, but also expressive activities, such as rallies or demonstrations. Petitioners have raised several issues concerning the First Amendment requirements that apply to such an ordinance.

The National Park Service of the United States Department of the Interior is charged with promoting and regulating the use of the National Parks, some of which are sometimes used for special events and demonstrations, such as marching, picketing, religious services, and other activities protected under the First Amendment. 16 U.S.C. 1 (1994 & Supp. V 1999); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 289-290 (1984). The Park Service has

promulgated regulations under which permits are generally required for demonstrations and special events held in the National Capital Region. See 36 C.F.R. 7.96(g)(2)-(6). The regulations also set forth procedures for the application, extension, or revocation of a permit. 36 C.F.R. 7.96(g)(3), (4)(iii), (5)(iv) and (6). The regulations do not require a judicial decision on the merits before the denial of a permit takes effect.

The Forest Service of the Department of Agriculture also has promulgated regulations that require special-use permits governing non-commercial activity by groups of 75 or more on National Forest System land. 36 C.F.R. 251.50, 251.51, 251.54, 251.56, 251.60, 251.64. Those regulations are designed to "provid[e] a reasonable administrative system for allocating space among scheduled and existing uses and activities, address[] concerns of public health and safety, and control[] or prevent[] adverse impacts on forest resources." 60 Fed. Reg. 45,258 (1995). The United States therefore has a significant interest in the First Amendment requirements that apply to permit provisions such as the ordinance at issue in the present case.

## STATEMENT

1. The Chicago Park District is responsible for operating hundreds of public parks and other public facilities in Chicago. See generally 70 Ill. Comp. Stat. Ann. 1505 (West 1993 & Supp. 2001). The Park District is authorized to "establish by ordinance all needful rules and regulations for the government and protection of parks * * * and other property under its jurisdiction." *Id.* § 7.02 (1993). One of the Park District's ordinances requires individuals to obtain a permit in order to "conduct * * * event[s] involving more than fifty individuals" on park property. Chicago Park Dist. Code, ch. VII, § C3a(1); Pet. App. 91a. This permit requirement applies both to events involving First Amendment



expression, such as "public assembl[ies]" and "parade[s]," and to events that do not involve any expressive activity, such as "picnics." *Ibid.* The ordinance also requires a permit for other activities that have the potential to interfere with the public use and enjoyment of the parks, such as "creat[ing] or emit[ting] any Amplified Sound" or "sell[ing] or offer[ing] for sale any goods or services." *Id.* §§ C3a(6), C3a(9); Pet. App. 92a.

The ordinance sets forth 13 grounds upon which the Park District may deny an application for a permit. Chicago Park Dist. Code § C5e; Pet. App. 5a, 97a-98a. A permit may be denied because, *inter alia*, another permit has been granted to an earlier applicant for the same time and place; the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; the applicant has violated the terms of a prior permit; or the applicant has damaged park property on prior occasions and has not paid for the damage. *Ibid.*; see pp. 15-16, *infra*. None of the grounds for denying a permit application is based on the content of the expressive activity (if any) involved in the event at issue.

The Park District must decide whether to grant or deny a permit within 14 days of receipt of an application, subject to a provision for an extension up to an additional 14 days on written notice to the applicant. Pet. App. 10a, 43a. If the Park District denies an application, it must "clearly set forth" the grounds for such denial in writing and, "where feasible," it must propose "measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit." Chicago Park Dist. Code § C5e; Pet. App. 96a. An unsuccessful applicant has seven days to file a written appeal to the General Superintendent of the Park District. Chicago Park Dist. Code § C6a(1); Pet. App. 99a. The General Superintendent must issue a decision within

seven days from receipt of the appeal. Chicago Park Dist. Code § C6a(2); Pet. App. 99a.

If the General Superintendent affirms the denial, the applicant may seek judicial review in state court by common law certiorari. See Pet. App. 8a; *Norton* v. *Nicholson*, 543 N.E.2d 1053, 1059 (Ill. App. Ct. 1989), cert. denied, 496 U.S. 938 (1990). A proceeding for common law certiorari is heard in the same state court that reviews cases under the Illinois administrative procedure act, and "amounts to the usual substantial-evidence review that is familiar from administrative law." Pet. App. 8a-9a. Among their other powers, Illinois courts have "the inherent power to issue temporary restraining orders or preliminary injunctions," *Ardt* v. *Illinois Dep't of Prof'l Reg.*, 607 N.E.2d 1226, 1230 (Ill. 1992), and that authority is available in all cases, including common law certiorari cases. See, *e.g.*, *Washington* v. *Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993).

2. This suit presents a facial challenge under 42 U.S.C. 1983 to the constitutionality of the permit ordinance. The suit was originally brought by Robert MacDonald, an advocate of marijuana legalization who sought to hold rallies in Chicago parks. MacDonald died during the course of the litigation, and petitioners Cáren Cronk Thomas and the Windy City Hemp Development Board were substituted as plaintiffs.

In March 1997, McDonald applied for a permit for an event in May of that year, but the Park District denied the application based on, *inter alia*, multiple violations of permits for events held in August 1996. Pet. App. 18a; J.A. 77-78, 81-83. McDonald then brought this action in federal district court. On May 23, 1997, he sought a preliminary injunction against enforcement of the Park District's permit ordinance, and an order allowing him to hold a rally in August 1997. Pet. App. 20a. MacDonald alleged that the permit ordinance was facially unconstitutional because it gave Park District officials



unfettered discretion to deny permits. The district court enjoined the Park District from enforcing certain provisions of its ordinance, but the Seventh Circuit reversed. See *MacDonald* v. *Chicago Park Dist.*, 132 F.3d 355, 356 (1997). The court ruled that "both the balance of harms and the public interest weigh decidedly in the Park District's favor" and that MacDonald had not demonstrated a strong likelihood of success on the merits. *Id.* at 361-362.

On January 2, 1998, MacDonald applied for a permit to hold another rally on May 9-10, 1998. Pet. App. 22a. The Park District denied his application on January 15, 1998, on the ground that the locations MacDonald requested were not available on those dates. See *ibid.* MacDonald did not appeal the denial to the General Superintendent. *Ibid.* Instead, MacDonald sought an injunction in federal district court to compel the Park District to issue a permit. *Id.* at 21a. MacDonald again alleged, *inter alia*, that the ordinance is unconstitutional because it grants unbridled discretion to Park District officials, see *id.* at 78a-82a, and because it does not ensure a prompt judicial decision on the merits of a permit denial and does not require the Park District to initiate judicial proceedings to effect permit denials, see *id.* at 32a, 45a-48a. The district court rejected MacDonald's claims and granted summary judgment to the Park District. *Id.* at 75a-89a.

3. The Seventh Circuit affirmed the district court's decision. Pet. App. 1a-12a.

At the outset, the court explained that petitioners were asserting a facial challenge to the Park District's permit ordinance. Pet. App. 2a. The court characterized as "not * * * a helpful formula" petitioners' claim that the ordinance must "be free of any element of vagueness or uncertainty that might enable [it] to be enforced in such a way as to deter or impede" protected speech because it is a "prior restraint." *Id.* at 2a-3a. The court noted that the Park

District's ordinance does not pose the risks of a censorship scheme because it "does not authorize any judgment about the content of any speeches or other expressive activity." *Id.* at 3a. The Court noted as well that it "is not even clear" that the permit requirement reduces speech, since allowing unregulated access to city parks "could easily reduce rather than enlarge the park's utility as a forum for speech." *Ibid.* At the same time, the court acknowledged that "[t]here is * * * a danger in giving officials broad discretion over which political rallies shall be permitted to be conducted on public property, because they will be tempted to exercise that discretion in favor of their political friends and against their political enemies." *Id.* at 4a. The existence of those competing interests, the court observed, must "give pause to any court minded to strike down a permit regulation on its face." *Ibid.*

The court then turned to the merits of petitioners' facial challenge. First, the court rejected as frivolous petitioners' claim that one of the ordinance's grounds for denying a permit—that the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted"—is too vague. Pet. App. 5a (quoting Chicago Park Dist. Code § C5e). The court noted that "material" is "one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud." *Ibid.* The court also rejected petitioners' contention that the ordinance grants too much discretion to the Park District, because it provides that the Park District "may" deny permits on the specified grounds, but does not require it to do so. *Id.* at 6a. The court reasoned that if the Park District were required to reject a permit on the stated grounds, "the regulation would be more restrictive than it is." *Ibid.*

Finally, the court rejected petitioners' claims relating to the sufficiency of state procedures for judicial review of permit denials. Relying on *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), the court held that the requirement in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), that the government seek judicial review of its own action is limited to laws that allow government officials to engage in censorship through content-based determinations. Pet. App. 9a. The court also rejected petitioners' claim "that the required expedition at the administrative level will be undone by foot dragging at the state court level." *Id.* at 10a. The court explained that "[s]ince 42 U.S.C. § 1983, the statute under which federal constitutional claims are litigated in the federal courts, does not impose any requirement * * * of exhausting state judicial remedies, the victim of foot dragging in state court can always bring a parallel suit in federal court, complaining that the delay is denying him an adequate remedy for the violation of his constitutional rights." *Id.* at 11a.



The court distinguished other circuits' holdings that imposed a requirement of prompt judicial decision after the denial of a permit, on the ground that those cases involved permit schemes aimed at adult-oriented businesses. Pet. App. 11a. In those cases, the court explained, the "government's evident concern with the content of the 'speech' disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases." *Ibid.* By contrast, the "permit requirement at issue here is far more general and so far as appears the permits that are denied do not relate to controversial or unpopular expression." *Id.* at 12a.

## SUMMARY OF ARGUMENT

I. Contrary to petitioners' claim, this case does not present the question whether a court should entertain a facial First Amendment challenge to the Park District ordinance. The court of appeals in fact entertained petitioners' facial

challenge in this case and adjudicated it on its merits. In any event, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 126 (1992), held that a facial challenge could be brought to a non-content-based licensing ordinance that, like the one in this case, was broadly applicable to speech and non-speech activities in a traditional public forum. That holding is controlling here.

II. The court of appeals correctly held that the Park District ordinance is not a "prior restraint" that is similar to the censorship regime in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and that it therefore is not subject to the stringent substantive and procedural requirements of content-based prior restraints. Unlike a content-based censorship scheme, the Park District ordinance permits denial of a license only on grounds unrelated to the content of any expressive activity. Moreover, unlike a content-based censorship scheme, the Park District ordinance does not single out expressive activities for regulation, but applies equally to all park activities involving large groups.

That does not mean that the First Amendment is inapplicable to the Park District ordinance. Because the ordinance may have the effect of imposing a limit on speech in a public forum, it must not leave officials with unfettered discretion to deny permits and thereby restrict speech on impermissible grounds. The ordinance satisfies that standard. It allows officials to deny permits only on certain simple, clearly stated grounds, and any applicant who satisfies the stated conditions must be granted a permit.

The fact that the ordinance vests some discretion in officials to grant permits despite *de minimis* or technical violations does not violate the First Amendment. Without such discretion, the ordinance would be more—not less—restrictive of speech. Moreover, state administrative law imposes restrictions on the Park District's discretion. It would violate state law for the Park District to exercise its



discretion arbitrarily, granting a permit to one applicant despite a minor violation while denying a permit to a similarly situated applicant because of the same violation.

III. The court of appeals also correctly held that the availability of judicial review of permit denials under the Park District ordinance, including the availability of prompt temporary or preliminary relief, satisfies First Amendment procedural standards. Under *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), an ordinance that requires the licensing of sexually oriented businesses need only provide for the availability of prompt judicial review of a challenge to a permit denial and need not provide that the licensing authority must itself initiate a judicial proceeding to render the denial legally enforceable. Those same conclusions apply *a fortiori* here. As noted above, like in *FW/PBS*—and unlike in *Freedman*, where stricter standards of judicial review were required—the Park District ordinance does not allow authorities to deny a permit based on the content of the speech for which the permit is sought. Indeed, the Park District ordinance is not only content-neutral, as in *FW/PBS*, but also speech-neutral, since it applies equally to non-expressive as well as expressive activities.

The constitutionality of the procedures for judicial review here is supported by *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953), in which this Court held that ordinary judicial review proceedings were sufficient under the First Amendment in a case involving a challenge to a license denial under an ordinance similar to the one in this case. Although some form of expeditious relief, such as temporary or preliminary injunctive relief, presumably must be available in appropriate cases to protect First Amendment interests, imposing strict time limits for a final judicial decision in all permit denial cases is unnecessary and would impose significant costs on the court system and other litigants. Nor is there any justification, in the context of a content-neutral permit

requirement like the one here, to take the extraordinary step of requiring the Park District to initiate judicial review of its own denials of permit applications.

## ARGUMENT

### I. THE COURT OF APPEALS PROPERLY ENTERTAINED PETITIONERS' FACIAL CHALLENGE TO THE PARK DISTRICT ORDINANCE

Petitioners claim (Br. 12) that the court of appeals "decreed that facial challenges should not be entertained in First Amendment cases without proof that the law has been applied in an unconstitutional manner." The court of appeals did not hold or state that facial challenges may not be heard. To the contrary, the court entertained petitioners' facial challenge, although the court ultimately rejected it on its merits. Indeed, respondent did not argue below that petitioners may not bring a facial challenge, and respondent does not advance that argument in this Court. See Br. in Opp. 7 ("The Seventh Circuit did not hold, and Respondent has never argued, that a facial challenge is unavailable or inappropriate to Petitioners here."). Accordingly, this case does not present the question whether a facial challenge to an ordinance such as this may be entertained.

In any event, in *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 126 (1992), this Court held that a facial challenge may be brought in a similar context. The ordinance in *Forsyth County* required permits to be obtained "for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." Like the ordinance in this case, the ordinance in *Forsyth County* was not limited to expressive activity, but was applicable to "any activity on public property," regardless of whether the activity involved protected expression. *Id.* at



131.[1] That feature suggests a generality of purpose and application that would tend to mitigate First Amendment concerns. See *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 760-761 (1988). On the other hand, the ordinance in *Forsyth County*, also like the ordinance in this case, required a permit "before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum.'" 505 U.S. at 130 (quoting *Frisby* v. *Schultz*, 487 U.S. 474, 480 (1988)). Public streets and parks are "quintessential public forums," and the use of such forums "for purposes of assembly, communicating thoughts between citizens, and discussing public questions" has traditionally enjoyed special solicitude under the First Amendment. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)). Accordingly, the Court held in *Forsyth County* that a facial challenge may be entertained. 505 U.S. at 129. That holding is controlling in this case.

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[1] Similarly, the National Park Service's regulations for National Capital Region parks impose permit requirements on both "demonstrations" and "special events," see 36 C.F.R. 7.96(g)(2), both of which are defined as events "the conduct of which has the effect, intent or propensity to draw a crowd or onlookers." 36 C.F.R. 7.96(g)(1)(i) and (ii), and (2). The term "demonstrations" includes "demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other forms of conduct which involve the communication or expression of views or grievances." 36 C.F.R. 7.96(g)(1)(i). The term "special events" includes "sports events, pageants, celebrations, historical reenactments, regattas, entertainments, exhibitions, parades, fairs, festivals and similar events" that are not "demonstrations." 36 C.F.R. 7.96(g)(1)(ii). The major differences between the rules applicable to the two categories are that some demonstrations may be held without a permit, whereas all special events require permits, see 36 C.F.R. 7.96(g)(2)(i) and (ii), and demonstrations are permitted in some areas in which special events are not, see 36 C.F.R. 7.96(g)(3)(i). See also 36 C.F.R. 251.50, 251.51 ("special use" permits required for National Forest Service lands).

Although the court of appeals entertained petitioners' facial challenge, the court did advert to the limitations inherent in such a challenge when the ordinance under attack is content-neutral (indeed, speech-neutral). The court noted the "competing interests" at stake in a case such as this, since "[a] park is a limited space, and to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech" when competing users attempt to use the same part of the park. In the court's view, such considerations "must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied." Pet. App. 3a-4a. The court of appeals was correct that those considerations may properly inform the analysis in a case such as this. But the court was also correct in reaching the merits of petitioners' facial challenge, and as we explain below, it was correct in rejecting that challenge.

## II. THE PARK DISTRICT ORDINANCE DOES NOT VEST ADMINISTRATIVE OFFICIALS WITH UNCONSTITUTIONAL LICENSING DISCRETION

### A. The Park District Ordinance Is Not The Kind Of Content-Based "Prior Restraint" That Is Presumptively Unconstitutional

Petitioners argue (Br. 15-24) that the Park District's permit ordinance is a species of "prior restraint" and, as such, should be regarded as presumptively unconstitutional under the First Amendment. Petitioners ask the Court to equate the kind of content-neutral permitting requirement involved in this case with censorship systems under which the government requires individuals to obtain licenses before they may engage in certain types of speech at all—at any place and at any time—and bases the availability of a



license on the content of the speech. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

The permitting ordinance in this case is not presumptively unconstitutional and does not come before the Court with the heavy burden of justification that such "prior restraints" based on censorship schemes must satisfy. See Pet. App. 2a-4a. Petitioners want to use particular places (public parks) at particular times to engage in expressive activity. The use of public parks, however, gives rise to problems that are unrelated to the content or existence of any expressive activity, such as excessive crowding, damage to property, competing and inconsistent attempts to use the same area, and threats to public safety. Unlike a censorship scheme, the Park District ordinance employs permitting criteria that are not based on the content of the speech (if any) involved in the proposed activity, but instead are based on non-communicative concerns such as avoiding scheduling conflicts, ensuring traffic flow, and protecting public safety and park property. See pp. 15-16, *infra*. Moreover, the ordinance does not single out expressive activities for regulation, but instead applies equally to all park activities involving large groups, regardless of whether they involve protected expressive activity (such as rallies and marches) or non-protected, non-expressive activities (such as athletic contests and picnics).

Those features render the Park District's ordinance far less "fraught with danger" to First Amendment interests, *Freedman*, 380 U.S. at 57, than content-based censorship schemes. While governmental regulation of the content of speech in a public forum is subject to the most searching First Amendment review, this Court has long recognized that governments have greater latitude to regulate the use of public forums for the purpose of addressing non-content-related problems. See, *e.g.*, *Perry Educ. Ass'n*, 460 U.S. at

45; *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761 (1995). Such latitude applies in this case.

### B. The Park District Ordinance Contains Reasonably Definite, Content-Neutral Standards For The Denial Of A Permit

The court of appeals correctly held that the criteria for permit denial in the Park District ordinance provide definite, content-neutral standards that satisfy the First Amendment because they do not vest an impermissible degree of discretion in licensing officials. See Pet. App. 4a-6a.

1. Although the Park District ordinance is not a censorship scheme, it is subject to First Amendment scrutiny. Even when, as in this case, such an ordinance is intended to deal solely with non-content-based concerns, it is conceivable that an official could attempt in a particular case to invoke the ordinance to prevent disfavored speech in the traditional public forum of a public park. See Pet. App. 4a. The more broadly the permit system vests the official with discretion over the licensing decision, the greater the risk that the system may be misused for content-based decisionmaking that is impermissible in a traditional public forum. Thus, to satisfy the First Amendment, an ordinance that requires an individual to obtain a permit prior to engaging in expressive activity in a park or other traditional public forum must cabin administrative discretion by providing reasonably definite content-neutral standards upon which government officials must base their decisions whether to grant a permit. See *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951) ("narrowly drawn, reasonable and definite standards for the officials to follow").[2]

[2] In addition, such permit systems must satisfy the traditional time, place and manner test, under which a permit requirement "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth County*, 505 U.S. at 130. Petitioners do not allege that the Park District's permit scheme fails to satisfy this test.



The risks to speech are substantially less than in the censorship context, however, and "perfect clarity and precise guidance" in the language of the standards is not required. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989). Instead, it is enough that the ordinance contain "neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood*, 486 U.S. at 760. Government officials must be allowed some degree of discretion in furthering the legitimate public interest in regulating the scheduling of, for example, rallies and parades in a manner that is consistent with public safety, the preservation of park land and property, and the management of pedestrian and vehicle traffic.

2. None of the ordinance's criteria for denial of a permit is based on the content of the speech at issue. The Park District may deny a permit only on one or more of the following grounds: (1) the applicant has filed an incomplete application; (2) the applicant has failed to pay required fees or to provide proof of insurance; (3) there is "a material falsehood or misrepresentation" in the application; (4) the applicant "is legally incompetent to contract or to sue or to be sued"; (5) the applicant has damaged Park District property in the past or has other unpaid debts to the Park District; (6) a prior applicant has already received or will receive a permit for the same time and place; (7) the proposed activity will conflict with previously-planned Park District programs; (8) the proposed activity is "prohibited by or inconsistent with" the classifications or uses of the park; (9) the proposed activity would "present an unreasonable danger to * * * health or safety"; (10) the applicant has not complied with Park District regulations regarding the sale of goods or services; (11) the proposed activity is illegal;

(12) the applicant has not obtained the required insurance; or (13) the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of an event" or has violated the terms of prior permits. Pet. App. 97a-99a.

Those are the only grounds on which a permit may be denied. They are objective and reasonable, and none of them turns on the content—or even the existence—of any expressive activity involved in the function for which the permit may be sought.[3] Those grounds for denial of a license therefore serve reasonably to "insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood*, 486 U.S. at 760. Furthermore, the ordinance requires the Park District, in its notice of denial of an application for a permit, to "clearly set forth the grounds upon which the permit was denied." Chicago Park Dist. Code § C5e; Pet. App. 96a. The requirement that the agency state its reasons, under an ordinance that itself contains reasonably narrow, objective, and definite grounds for denying a permit and provides for an appeal to the General Superintendent, furnishes additional protection against arbitrary treatment. Compare *Forsyth County*, 505 U.S. at 133 (noting that there are "no articulated standards" in the ordinance, that "the administrator is not required to rely on objective factors," that the administrator "need not provide any explanation for his decision," and that his decision is "unreviewable"); *Dunlop* v. *Bachowski*, 421 U.S. 560, 572 (1975) (statement of reasons "promotes thought by the Secretary and compels him to cover the relevent points and eschew irrelevancies"); Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1292 (1975) (the "necessity for justification" is "a powerful preventive for wrong decisions").

[3] National Park Service permit regulations for the National Capital Region parks provide that permits "may be denied" if (a) a prior permit application has been received that "has been or will be granted authorizing activities which do not reasonably permit multiple occupancy of the particular area"; (b) "[i]t reasonably appears that the proposed demonstration or special event will present a clear and present danger to the public safety, good order, or health"; (c) "[t]he proposed demonstration or special event is of such a nature or duration that it cannot reasonably be accommodated in the particular area applied for"; or (d) "[t]he application proposes activities contrary to any" applicable laws or regulations. 36 C.F.R. 7.96(g)(4)(iii). In determining whether to approve a "special event" (see note 1, *supra*), the National Park Service also considers criteria listed at 36 C.F.R. 7.96(g)(5)(vi), including whether the objectives of the event are within the basic mission of the Service's National Capital Region; whether the area required is reasonably suited in terms of accessibility, size, and nature of the proposed event; whether it can be accommodated within a reasonable allocation of Park Service funds; and whether the event is duplicative of others in the region. See also 36 C.F.R. 251.54(e)(1) and (5) (criteria for screening "special use" permits for National Forest Service land).



3. Petitioners nonetheless claim (Br. 28-29) that "denial [of a permit application] is completely discretionary," because the ordinance provides that the Park District "may" (rather than "must") deny permits on the specified grounds. That modest degree of discretion does not render the ordinance facially unconstitutional.

a. Initially, petitioners err in stating (Br. 28) that a permit denial "is completely discretionary." To the contrary, the ordinance provides officials with no discretion to deny a permit for reasons other than those specified in the ordinance. Most speakers or other users of the park can be expected to satisfy each of the straightforward and sensible criteria in the ordinance. In all such cases, the ordinance mandates that the permit be granted and provides officials with no discretion whatsoever.[4]

[4] When this Court has invalidated a licensing scheme on its face on the ground that it granted too much discretion to administrators, the Court has generally done so when the scheme placed *no* limits on the officials'

In addition, as the Seventh Circuit explained, in the absence of the term "may" in the ordinance, the Park District would be compelled to reject a permit if one of the specified grounds was present, regardless of whether there were also mitigating circumstances in a particular case. In that event, "the regulation would be more restrictive [of speech] than it is." Pet. App. 6a. The permitting scheme governs a very broad range of activities, both expressive and non-expressive. The existence of some degree of discretion permits Park District officials to issue permits in spite of *de minimis* or technical violations that would otherwise trigger automatic denial.

Moreover, as a matter of state law, the Park District, like any other administrative body, may not make decisions that are arbitrary or capricious or otherwise irrational. See *Hanrahan* v. *Williams*, 673 N.E.2d 251, 253-254 (Ill. 1996) ("The standards of review under a common law writ of *certiorari* are essentially the same as those under the Administrative Review Law. Under the Administrative Review Law, courts generally do not interfere with an agency's discretionary authority unless the exercise of that discretion is arbitrary and capricious * * * or the agency action is against the manifest weight of the evidence.") (citations omitted), cert. denied, 522 U.S. 812 (1997). If the Park District treats two identically situated applicants differently—

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discretion. See, *e.g.*, *Forsyth County*, 505 U.S. at 133 ("[t]he decision how much to charge * * * —or even whether to charge at all—is left to the whim of the administrator"); *City of Lakewood*, 486 U.S. at 769 ("the face of the ordinance itself contains no explicit limits on the mayor's discretion"); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150 (1969) (officials "were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience,'" and the ordinance thus "conferred upon the City Commission virtually unbridled and absolute power to prohibit" parades, processions or demonstrations on city streets).



say, by denying a permit for a technical violation in one case while overlooking that same violation and granting the permit in another case—the District would thereby be violating settled state administrative law. Accordingly, state law itself imposes limitations on the modest discretion introduced into the scheme by the word "may."

Finally, even if the term "may" were replaced by "must" in the Park District ordinance, the government would still retain the ultimate discretion not to prosecute individuals who engage in covered activities without permits. See generally *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Petitioners have never argued that prosecutorial discretion of that sort violates the First Amendment; to the contrary, petitioners themselves have been its beneficiaries. See Pet. App. 17a ("[E]ven though Mr. MacDonald had no permit for May 10 and 11, 1997, the Park District did not stop his rally and, in fact, helped him to plan for it."). So long as the government retains the discretion not to prosecute some individuals who engage in licensed activities without permits, the use of the word "may" in the ordinance adds little additional discretion; like prosecutorial discretion, it simply authorizes the Park District to allow individuals who would not, strictly speaking, qualify for a license to engage in the activities anyway.

b. In these circumstances, the court of appeals was correct in holding that First Amendment interests are adequately vindicated through the specification of non-content-based grounds for denial of a permit and the availability of an "as applied" challenge, in which an unsuccessful applicant would have the opportunity to show that the Park District acted unlawfully or arbitrarily in denying a permit—*e.g.*, because it has granted licenses to other similarly situated applicants based on the content of their speech or the absence of any protected expressive activity. See Pet. App. 10a. Such a challenge would allow those who seek to engage

in expressive conduct to ensure that the residual discretion left to the Park District under the ordinance is not used in a way that violates the First Amendment, while allowing the Park District to operate a practical licensing scheme that ultimately protects those who use the parks for a variety of both expressive and non-expressive activities.[5]

## III. A CONTENT-NEUTRAL PERMIT ORDINANCE NEED NOT PROVIDE A STRICT DEADLINE FOR JUDICIAL DECISION ON THE MERITS OF A PERMIT DENIAL OR REQUIRE THE GOVERNMENT TO BEAR THE BURDEN OF SEEKING JUDICIAL REVIEW TO EFFECT THE DENIAL OF A PERMIT

### A. The Procedures Required In *Freedman* v. *Maryland* For Censorship Schemes Are Not All Applicable To Content-Neutral Laws

Petitioners argue (Br. 30-33) that, under *Freedman* v. *Maryland*, a permit ordinance like the one in this case cannot be upheld unless it ensures a prompt final judicial decision on the merits of a permit denial and unless the government bears the burden of seeking judicial review to

[5] Insofar as petitioners are still contending that the use of the term "material" grants too much discretion to administrators to determine when a falsehood on an application warrants denial of the permit (see Pet. Br. 26-28), the court of appeals correctly held that that term is sufficiently definite because it "is one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud." Pet. App. 5a. The court also noted that eliminating the term "material" "would make the regulation more rather than less restrictive," because it would "authorize[] denying a permit to anyone who has told the park district a fib." *Ibid.* For those reasons, the use of the term "material" in the ordinance in this case does not violate the First Amendment.



effectuate the denial. Petitioners' reliance on *Freedman* is misplaced.

1. In *Freedman*, this Court struck down a Maryland statute that required a state censorship board to approve motion pictures before they could be shown anywhere in the State. The goal of the statute was to prevent the display of obscene or otherwise "immoral" motion pictures. 380 U.S. at 52 nn.1-2. Finding that the "apparatus of censorship" is one "always fraught with danger and viewed with suspicion" and that "[t]he administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech," *id.* at 57, the Court held that three procedural safeguards were necessary to uphold such a censorship scheme: (1) the censor must bear the burden of proof that the movie is unprotected expression; (2) the law must assure that "the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film," with any "restraint imposed in advance of a final judicial determination on the merits" to be "limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) the scheme "must also assure a prompt final judicial decision." *Id.* at 58-59.

2. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), the Court ruled that some of *Freedman*'s procedural requirements do not apply to an ordinance that required the licensing of adult-oriented businesses and was "aimed at eradicating the secondary effects of crime and urban blight." *Id.* at 220. The plurality opinion in *FW/PBS* summarized *Freedman*'s procedural safeguards as follows: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Id.* at 227.

The plurality explained that the "core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." 493 U.S. at 228. As a result, "the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Ibid.*

The plurality concluded, however, that *Freedman*'s other procedural safeguards are not required in that setting.[6] 493 U.S. at 229-230. The plurality distinguished *Freedman* on the ground, *inter alia*, that it involved "direct censorship of particular expressive material," which, under the First Amendment, "is presumptively invalid." *Id.* at 229. By contrast, under the ordinance at issue in *FW/PBS*, city officials did not "exercise discretion by passing judgment on the content of any protected speech"; rather, they "review[ed] the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Ibid.* In that context, "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy" First Amendment standards. *Id.* at 230.

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[6] The plurality opinion on this point represented the views of three Justices. Justice White, joined by the Chief Justice, would not have applied any of the *Freedman* requirements to the city's ordinance. See *FW/PBS*, 493 U.S. at 244-249 (White, J., dissenting in part); see also *id.* at 250-264 (Scalia, J., dissenting in part). A majority of the Court thus necessarily concluded that a strict deadline for judicial review was unnecessary and that the city was not required to seek judicial review of its own denial of a license or to bear the burden of proof in court; and this court's judgment embodied that conclusion. See *id.* at 238.



### B. The First Amendment Does Not Require That The Park District Ordinance Ensure A Strict Deadline For Judicial Decision On The Merits Of A Permit Denial

1. Like the law challenged in *FW/PBS*, the Park District ordinance does not create the dangers of censorship that were present in *Freedman* and that led the Court to insist on a strict timetable for final judicial decision on the merits of a permit denial in that case. Like the law in *FW/PBS*, the Park District ordinance is not content-based; indeed, it is not even speech-based, since it applies to a broad range of non-expressive activities as well as expressive activities. The ordinance is directed solely at the non-communicative impact of large public gatherings, such as competing uses, congestion and damage to park property. Accordingly, as in *FW/PBS*, the *Freedman* requirement of a strict deadline for judicial disposition of a challenge to a license denial does not apply here.

2. In *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953), decided twelve years before *Freedman*, this Court squarely rejected a claim that a park permit ordinance violated the First Amendment because of the mere potential for delay associated with judicial review of permit decisions. See also *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). The Court's decision in *Poulos* was not overruled by *Freedman*, and it remains instructive regarding petitioners' claimed right to a strict deadline for judicial decision.

The ordinance at issue in *Poulos* required an individual to obtain a license to engage in expressive activity in a public park. 345 U.S. at 396-397. Poulos, a Jehovah's Witness, was denied a license to hold a religious service, and he was arrested for violating the permit ordinance when he nonetheless held the service. *Id.* at 397. This Court granted certiorari to consider the constitutionality of the license requirement, and also to consider whether "the arbitrary refusal of

such a license by the Council, resulting in delay, if appellant must * * * pursue judicial remedies, was unconstitutional, as an abridgement of free speech and a prohibition of the free exercise of religion." *Id.* at 401.

After upholding the constitutionality of the ordinance itself, the Court addressed Poulos' claim that his First Amendment rights were "abridg[ed] * * * *because of delay through judicial proceedings* to obtain the right of speech and to carry out religious exercises." 345 U.S. at 401 (emphasis added). Although the Court acknowledged that judicial review could be "exulcerating and costly," *id.* at 409, it concluded that, while "[d]elay is unfortunate," the "expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning." *Ibid.*

In *Poulos*, there was "a valid ordinance, an unlawful refusal of a license, with remedial state procedure for the correction of the error." 345 U.S. at 414. The Court held that the "state had authority to determine, in the public interest, the reasonable method for correction of the error, that is, by certiorari [review in state court]." *Ibid.* The Court did not require that the ordinance set a strict deadline for judicial resolution of the merits of a permit denial. *Poulos* thus suggests that where, as here, a permit ordinance is content-neutral and does not vest local officials with unfettered discretion, affording the applicant access to a "remedial state procedure," *ibid.*—including "the availability of prompt judicial review," *FW/PBS*, 493 U.S. at 230, through a motion for preliminary injunctive relief or other expedited resolution—is sufficient to satisfy the First Amendment.

3. That conclusion is supported by the substantial costs that a strict deadline for judicial action imposes upon the judicial system and the parties to other cases. This Court has long recognized that there is "the power inherent in



every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936). Applying a strict deadline for resolution of any particular class of cases necessarily imposes a cost on the judiciary, since it makes it more difficult for courts to give the desirable time and attention to other cases. Moreover, such a deadline imposes a cost on all other litigants, whose cases necessarily are resolved more slowly so that the favored class of cases can be resolved within the deadline. Although the burdens of a strict deadline are justified in some classes of cases, see, *e.g.*, 18 U.S.C. 3161 *et seq.* (Speedy Trial Act of 1974), those burdens should not be imposed lightly.

Moreover, imposing a strict deadline for final judicial resolution of challenges to permit denials is unnecessary to ensure expedition in appropriate cases. The standards for a temporary restraining order or preliminary injunction or other modes of expedition are designed to identify cases in which the need for a speedy decision outweighs the costs imposed on the judicial system and other litigants. Courts can be expected to act in a timely manner and apply those standards with sensitivity to First Amendment interests. Cf. *Freedman*, 380 U.S. at 57-58 ("Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression."). In some cases, however, the ordinary standards for temporary or preliminary relief will not be satisfied—*e.g.*, where the moving party has little likelihood of success on the merits. There is no need to impose costs on the judicial system and other litigants in order to ensure immediate adjudication of an insubstantial claim that a permit was invalidly denied.

4. The requirement of a "remedial state procedure for the correction of * * * error," *Poulos*, 345 U.S. at 414, is thus satisfied in cases such as this so long as there is (1) "an effective limitation on the time within which the licensor's decision must be made," *FW/PBS*, 493 U.S. at 229, (2) the applicant has prompt access to the judicial process following a permit denial, and (3) the judicial process permits effective relief tailored to the exigencies and merits of the applicant's claim. The Park District ordinance satisfies those standards. First, the permit ordinance places strict time limits on the administrative process, which petitioners do not appear to challenge here. Second, the availability of judicial review in state court on a writ of common law certiorari to review permit denials, which is in substance "the same as under the state's administrative procedure act," Pet. App. 8a-9a, provides an applicant with prompt access to judicial review that satisfies constitutional standards. Third, under Illinois law, courts have "the inherent power to issue temporary restraining orders or preliminary injunctions," *Ardt* v. *Illinois Dep't of Prof'l Reg.*, 607 N.E.2d 1226, 1230 (Ill. 1992), and that power is available in all cases, including common law certiorari cases. See, *e.g.*, *Washington* v. *Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993); compare 5 U.S.C. 705 (reviewing court may issue appropriate process "to preserve status or rights" in order "to prevent irreparable injury" pending completion of judicial review). There is no reason to believe that the Illinois courts will not provide effective and timely relief when warranted to vindicate an applicant's First Amendment rights.



### C. The First Amendment Does Not Require That The Park District Initiate Judicial Proceedings To Give Effect To Its Administrative Denial Of A Permit Application.

The court of appeals correctly held that the Park District need not bear the extraordinary burden of seeking judicial review of its own decision each time it denies a permit in order to give legal effect to the denial. See Pet. App. 9a.

1. In *FW/PBS*, this Court held, in the context of the licensing of adult-oriented businesses, that the unsuccessful applicant—not the government—bears the burden of initiating judicial review of the denial of a license. See 493 U.S. at 229-230. In the present case, as in *FW/PBS*, the actions of Park District officials in denying a permit are not presumptively invalid. See *id.* at 229. To the contrary, it is presumed that government officials who administer licensing laws that contain objective standards will properly discharge their duties under those laws. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); accord *Armstrong*, 517 U.S. at 464. In fact, there is even less reason here than in *FW/PBS* to presume the invalidity of permit denials, because the licensing requirement in *FW/PBS* "largely target[ed] businesses purveying sexually explicit speech," 493 U.S. at 224, while the permit requirement here applies equally to all large-scale group activities in Chicago's parks, non-expressive as well as expressive.

Furthermore, in a great many (perhaps most) cases, the applicant would have no realistic basis for contesting the permit denial under speech-neutral criteria or would choose not to do so once the Park District stated the grounds for the denial, perhaps choosing instead to remedy the specified defect in the application or seek approval for another time or place. A requirement that the Park District nevertheless obtain a judicial order confirming the validity even of those

permit denials would be pointless and would impose wholly unnecessary burdens not only on the Park District and the courts but also on the permit applicants themselves.[7]

This Court's decision in *Poulos*, *supra*, also establishes that the burden of seeking judicial review may be placed on the unsuccessful permit applicant. The Court held in *Poulos* that a State has the authority to require an unsuccessful permit applicant to seek judicial review, rather than proceed without the required license and raise his legal objectives as a defense in any subsequent prosecution for violation of the licensing ordinance. 345 U.S. at 414.

2. Petitioners contend (Br. 35) that a requirement that the government initiate judicial proceedings "ensures that judicial review will occur even when the applicant lacks the funds to pursue the court battle himself." Regardless of the incentive of the particular individual or association to seek judicial review, however, where the government action in dispute is not presumptively invalid, see p. 27, *supra*, the government should not have to bear the burden of seeking review of its own action. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (noting "the presumption of regularity afforded an agency in fulfilling its statutory mandate"). In other contexts in which an individual claims that government officials have violated his constitutional rights, the government is not required to seek judicial review of its own administrative action based

[7] In addition, a requirement that the government seek judicial review of its own decisions denying permits for activities protected by the First Amendment would pose severe line-drawing problems in the context of a licensing scheme, such as the one in this case, that makes no distinction between expressive and non-expressive activities. Presumably, the Park District would have to determine, each time a permit was denied, whether the activity in question involves expressive activities, so that the Park District could determine whether it was necessary to institute a judicial proceeding.



on an individual's incentives or financial ability to pursue judicial review. The *Freedman* exception to that general rule is based upon the unique circumstances of censorship and should not be extended to the present case.[8]

3. Petitioners contend (Br. 39-40) that the government should bear the burden of proof in court with respect to the validity of the permit denial. For the same reasons that the First Amendment does not require the government to initiate judicial proceedings to effect an administrative denial of a permit, the First Amendment does not require the government to bear the burden of proof once in court. See *FW/PBS*, 493 U.S. at 229. As explained above, permit decisions under the Park District ordinance are not content-based; rather, they are based on objective and reasonable criteria, and are thus distinguishable from the presumptively invalid acts of censors at issue in *Freedman*.

[8] In *FW/PBS*, the plurality observed that in *Freedman*, the motion picture distributor "was likely to be deterred from challenging the decision to suppress the speech," whereas in *FW/PBS*, "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." 493 U.S. at 229-230. Insofar as that consideration is relevant here, it supports our argument, because "the license is the key" to the applicant's ability to engage in its planned expressive activity in a park. In our view, however, the key distinction between this case and *Freedman* is the distinction between content-based censorship, as in *Freedman*, and a content-neutral (indeed, speech-neutral) permit requirement such as the one in this case.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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